MAYLAND LENDING SDN BHD v. PUA WOON KEE

COURT OF APPEAL, PUTRAJAYA
MOHAMAD ZABIDIN MOHD DIAH JCA
HADHARIAH SYED ISMAIL JCA
GUNALAN MUNIANDY JCA
[CIVIL APPEAL NO: W-02(NCVC)(W)-1846-09-2018]
6 AUGUST 2021

LIMITATION: *Action – Cause of action – Accrual of – When time began to run – Whether from date letter of demand issued to guarantor – Whether terms and deadline for repayment of debt altered by agreement – Whether fresh letter of demand given to guarantor – Whether parties mutually agreed to be bound by new terms of settlement of debt – Whether previous letter of demand rendered nugatory and ineffective – Whether current suit based on amount claimed in fresh letter of demand – Whether limitation set in – Whether claim time-barred – Limitation Act 1953, s. 6*

CONTRACT: *Guarantee – Action against guarantor – Demand for payment – Letter of demand – Whether claim time-barred – Accrual of cause of action – When time began to run – Whether from date letter of demand issued to guarantor – Whether terms and deadline for repayment of debt altered by agreement – Whether fresh letter of demand given to guarantor – Whether parties mutually agreed to be bound by new terms of settlement of debt – Whether previous letter of demand rendered nugatory and ineffective – Whether current suit based on amount claimed in fresh letter of demand – Whether limitation set in – Whether claim time-barred – Limitation Act 1953, s. 6*

The appellant, a licensed moneylender, and Apac Sunrise entered into a money lending agreement wherein Apac Sunrise borrowed a sum of RM10,000,000. The repayment of the same together with interest was to be made on or before 8 December 2008 to the appellant. Apac Sunrise defaulted in the repayment of the RM10,000,000 and sought for more time to repay. The appellant granted an extension of time pursuant to a settlement agreement ('first settlement agreement') on 20 February 2009. Simultaneously with the first settlement agreement, the directors of Apac Sunrise, the respondent and one Rossmaizati signed a letter of guarantee and undertaking dated 20 February 2009 ('guarantee') whereby they jointly and severally guaranteed, not merely as guarantors but as principal debtors, the full repayment of the RM10,000,000 by Apac Sunrise to the appellant. Apac Sunrise failed to pay the loan amount of RM10,000,000 and breached the first settlement agreement by the extended deadline of 8 June 2009. The appellant issued letters of demand dated 12 June 2009 to Apac Sunrise, the respondent and Rossmaizati, demanding for the principal debt and interests to be paid. Apac Sunrise, the respondent and Rossmaizati did not pay as demanded. A winding-up petition was filed at the High Court against Apac Sunrise

A ('winding-up petition') whilst a civil suit was also filed at the High Court against both the respondent and Rossmaizati as guarantors ('first suit'). The respondent had acknowledged that he had signed an affidavit-in-support of the application for an injunction to stop the winding-up petition in a civil suit that was taken out by Apac Sunrise ('second suit'). To enable Apac Sunrise B to settle all the monies owing to the appellant and a third-party creditor, a tripartite settlement agreement dated 25 June 2010 ('second settlement agreement') was entered into. The winding-up petition and both the first suit and the second suit were then all withdrawn. The respondent had also signed the declaration preserving the validity and the enforceability of the C guarantee. Shortly after, and before the first instalment repayment was even due under the second settlement agreement, the appellant filed a suit against Rossmaizati ('Shah Alam suit') on 30 June 2010 and the respondent was added subsequently as a co-defendant on 31 January 2012 to claim back the sum of RM10,000,000 from them as guarantors pursuant to the earlier letter of demand ('LOD') of 12 June 2009. However, the Shah Alam suit was D dismissed with liberty to file afresh as it was held that at the time of the filing of the suit, the liability to pay under the second settlement agreement had not arisen and thus, the appellant's claim was premature. The appellant then issued a fresh LOD dated 29 June 2016 to the respondent demanding the sum of RM10,000,000 and the respondent confirmed receipt of the said demand. E On 21 July 2016, this suit was filed by the appellant against the respondent seeking for, *inter alia*, RM10,000,000. The High Court Judge ('HCJ'), in dismissing the appellant's claim against the respondent, was of the view that since this action was only filed by the appellant on 21 July 2016, the appellant's claim was time-barred under s. 6 of the Limitation Act 1953 as F it was filed outside the six years' limitation period calculated from the date of the appellant's second demand *vide* the second LOD dated 12 June 2009. Dissatisfied, the appellant appealed. The appellant mounted their appeal on three main issues (i) that the second settlement agreement had altered and extended the time of repayment of the principal debtor by 30 monthly G instalments to commence from 1 August 2010; (ii) the amount in the LOD dated 29 June 2016 and the amount in the LOD dated 12 June 2009 were different; and (iii) the present claim was based on the LOD dated 29 June 2016 and therefore, the appellant's claim was not barred by limitation.

Held (allowing appeal)

H **Per Gunalan Muniandy JCA delivering the judgment of the court:**

(1) Consistent with settled law that a guarantor only becomes liable to pay on demand as in this case, the accrual of the cause of action would be calculated from the date the letter of demand is issued to the guarantor which would be the event that triggers the cause of action upon non- I compliance. The conduct of the parties in entering into the second settlement agreement was a relevant factor in determining the date of

accrual of the cause of action. The second settlement agreement had extended the time for Apac Sunrise to settle the debt to the appellant and the respondent had acknowledged that the guarantee remained valid and binding. The intention of the parties in entering into the second settlement agreement as reflected by its terms was indisputably to alter the time of repayment to 36 months and not to retain the 14-day period as demanded earlier against the guarantors, the respondent included, pursuant to the LOD dated 12 June 2009 which, for all intents and purposes, could be regarded as having been rendered nugatory and ineffective. (paras 35, 39 & 40)

(2) The respondent acknowledged the existence of the second settlement agreement while at the same time maintaining that the first LOD dated 12 June 2009 was still subsisting. This position could be rightly described as 'blowing hot and cold' as the second settlement agreement had altered the deadline for repayment by the principal debtor of the debt that had accrued to the appellant. It was a case of adopting two inconsistent and irreconcilable positions that was not acceptable under the principle of approbation and reprobation that would render the respondent's defence against a valid claim for a proven debt untenable. The LOD dated 12 June 2009 had become spent and been rendered nugatory by the second settlement agreement which had extended the timeline for repayment of the debt of RM10 million owed by Apac Sunrise and/or the respondent. When neither repaid the debt, it was lawful for the appellant to issue the fresh LOD dated 29 June 2016 for Apac Sunrise and/or the respondent. (paras 41 & 42)

(3) This court considered the chronology of events preceding the filing of this suit, in particular the Shah Alam suit filed by the appellant on 30 June 2010 against one of the guarantors, Rossmaizati, to claim back RM10 million owed by Apac. The respondent was added as a co-defendant on 31 January 2012. It was important to have in mind the decision of the High Court in the Shah Alam suit which was dismissed with liberty to file afresh because it was held that the appellant's cause of action against the respondent pursuant to the guarantee was premature as at the date of filing of the writ because it was filed on 30 June 2010 which was before the deadline for the first repayment by Apac Sunrise falling on 1 August 2010 as per the second settlement agreement. Based on the judgment, the first LOD dated 12 June 2009 had become invalid and/or inoperative and no liability could be attributed to the respondent as a guarantor under the same. Hence, it was crucial under the circumstances and in view of the decision in the Shah Alam suit to issue a fresh letter of demand as a basis to commence a fresh suit which the appellant did *via* the present suit to recover the substantial debt owed to them. (paras 43 & 44)

(4) The guarantee is a continuing guarantee that would subsist based on the principal debtor's indebtedness to the appellant which would entitle the latter to issue a fresh demand to the guarantor should the terms and deadline for repayment be altered by agreement which is precisely what occurred in the present case. It would be illogical if it were not so as subsequent to the second demand, the parties had mutually agreed to be bound by the new terms of settlement of the debt. Notwithstanding that the second settlement agreement was not pleaded in the statement of claim, a crucial fact was that the cause of action against the respondent as the guarantor for Apac Sunrise was founded on the third notice of demand and the amount claimed was as per this notice. Contrary to what was held by the HCJ that no differences could be drawn between the second and third LODs dated 12 June 2009 and 29 June 2016 respectively as the principal sum claimed remained the same and unchanged, the terms of the two LODs were conspicuously different. Amongst others, the term as to interest payment differed and so did the deadline imposed for settlement of the debt. In any event, of paramount importance was that the appellant's current suit against the respondent was based on the amount claimed as per the LOD of 29 June 2016 pursuant to the second settlement agreement and clearly not based on the LOD of 12 June 2009. (paras 57 & 58)

(5) The HCJ had plainly erred in principle and fact in concluding that limitation had set in based on the misconceived view that the appellant's claim was pursuant to the LOD dated 12 June 2009 which had lapsed whereas the LOD dated 29 June 2016 was lawful, valid and enforceable. As such, for purposes of limitation, time should begin to run from 29 June 2016 which would render the current suit to be within the statutory limitation period. This LOD was duly served on the principal debtor and the respondent but the debt claimed remained unsettled. The HCJ had come to a plainly wrong finding that on the evidence adduced, the appellant had failed to successfully prove its claim on a balance of probabilities by reason of the defence of limitation which had not been established. The finding that limitation had set in was wrong in fact and law. (paras 59 & 60)

Case(s) referred to:

Affin Bank Bhd v. Goh Hock Hai [2013] 1 LNS 307 CA ***(refd)***

Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd [1995] 4 CLJ 283 FC ***(refd)***

Cheah Theam Kheng v. City Centre Sdn Bhd (In Liquidation) & Other Appeals [2012] 2 CLJ 16 CA ***(refd)***

Joseph Thambirajah v. Bank Buruh (M) Bhd (Now Known As BSN Commercial Bank (M) Bhd) [2007] 1 LNS 715 CA ***(refd)***

Malayan Banking Bhd v. Boo Hock Soon [2012] 1 LNS 971 CA ***(refd)***

Mok Hin Wah & Ors v. United Malayan Banking Corp Bhd [1987] 2 CLJ 197; [1987] CLJ (Rep) 219 SC ***(refd)***

Nik Che Kok v. Public Bank Bhd [2001] 2 CLJ 157 CA ***(refd)***
PB Securities Sdn Bhd v. Autoways Holdings Bhd [2000] 4 CLJ 811 CA ***(refd)***
Samuel Naik Siang Ting v. Public Bank Bhd [2015] 8 CLJ 944 FC ***(refd)***
Soon Peng Yam & Anor v. Bank Of Tokyo-Mitsubishi (Malaysia) Bhd [2004] 1 CLJ 532 CA ***(refd)***
Tan Hood Keng v. ARP Aroonasalam Chetty & Anor [1912] 1 LNS 2 CA ***(refd)***
Tetuan Theselim Mohd Sahal & Co & Ors v. Tan Boon Huat & Anor [2017] 6 CLJ 368 CA ***(refd)***
The Pacific Bank Bhd v. Chan Peng Leong [1998] 2 CLJ 440 CA ***(refd)***

Legislation referred to:
Evidence Act 1950, s. 115
Limitation Act 1953, s. 6

For the appellant - Ringo Low & Brandon Lim; M/s Ringo Low & Assocs
For the respondent - David Mathews & R Vasanthi; M/s Lim Chee Wee Partnership

[Editor's note: Appeal from High Court, Kuala Lumpur; Suit No: WA-22NCVC-454-07-2016 (overruled).]

Reported by Suhainah Wahiduddin

JUDGMENT

Gunalan Muniandy JCA:

Introduction

[1] This is the appellant/plaintiff's appeal against the decision of the learned High Court Judge ("LHCJ") where the LHCJ dismissed the appellant's claim against the respondent/defendant.

Background Facts

[2] The appellant, a licensed moneylender and Apac Sunrise entered into a money lending agreement on 8 August 2008 wherein Apac Sunrise borrowed a sum of RM10,000,000. The repayment of the same together with interest was to be made on or before 8 December 2008 to the appellant.

[3] Apac Sunrise defaulted in the repayment of the RM10,000,000 and sought for more time to repay. The appellant granted an extension of time pursuant to a settlement agreement ("first settlement agreement") on 20 February 2009 wherein the salient terms are as follows:

(i) Apac Sunrise to pay RM200,000 immediately to the appellant being interest from 9 December 2008 to 8 February 2009 as an advance payment;

(ii) Apac Sunrise to pay the amount of RM10,000,000 to the appellant on or before 8 June 2009;

A (iii) Apac Sunrise to also pay the interest on the amount of RM10,000,000 at the rate of 14.4% per annum from 9 February 2009 until full and final settlement; and

(iv) Apac Sunrise will cause its directors, the respondent and Rossmaizati binti Mohamad ("Rossmaizati") to guarantee the full repayment by B Apac Sunrise to the appellant.

[4] Simultaneously with the first settlement agreement, the respondent and Rossmaizati signed a letter of guarantee and undertaking dated 20 February 2009 ("the guarantee") whereby they jointly and severally C guaranteed, not merely as guarantors but as principal debtors, the full repayment of the RM10,000,000 by Apac Sunrise to the appellant. The salient terms are as follows:

(i) to guarantee the repayment by Apac Sunrise of the sum of RM10,000,000 together with all interest thereon accruing ("the sum") D as stipulated in the said settlement agreement;

(ii) to pay the sum in the event that Apac Sunrise fails and/or neglects and/or refuses to pay the appellant in the manner provided by the terms and conditions prescribed in the settlement agreement;

E (iii) this guarantee is a continuing guarantee until the full repayment by Apac Sunrise or the respondent and Rossmaizati of the sum and/or any other amount due and owing to the appellant;

(iv) in the event that Apac Sunrise shall fail to pay the sum by the time prescribed in the settlement agreement, the appellant shall be entitled to, F without notice to Apac Sunrise, demand for the repayment of the sum from the respondent and Rossmaizati; and

(v) the service of any legal process may be given by prepaid registered post sent to the respective address for service of the parties hereto and such legal process shall be deemed to have been duly served after the G expiration of five days from the date it is posted.

[5] Apac Sunrise failed to pay the loan amount of RM10,000,000 and breached the first settlement agreement by the extended deadline of 8 June 2009.

H **[6]** The appellant through their solicitors issued letters of demand dated 12 June 2009 to Apac Sunrise, the respondent and Rossmaizati. In the said letter of demand to the respondent and Rossmaizati, the appellant demanded the following:

(i) RM362,958 being the interest for the period until 8 June 2009 which I was agreed to be paid;

(ii) RM10,000,000 being the principal debt; and

(iii) all interests on the principal debt at the rate of 14.4% per annum calculated from 9 June 2009 to the full settlement date and costs of RM200.00 for the said demand;

to be paid within 14 days from the date of the demand.

[7] Apac Sunrise, the respondent and/or Rossmaizati did not pay as demanded. A winding-up petition was filed at the Kuala Lumpur High Court against Apac Sunrise ("winding-up petition") whilst a civil suit was also filed at the Kuala Lumpur High Court against both the respondent and Rossmaizati as guarantors ("first suit").

[8] The respondent had acknowledged that he had signed an affidavit-in-support of the application for an injunction to stop the winding-up petition in a civil suit that was taken out by Apac Sunrise ("second suit").

[9] To enable Apac Sunrise to settle all the monies owing to the appellant and a third-party creditor, namely, Malaysia Land Properties Sdn Bhd ("MLP"), a tripartite settlement agreement dated 25 June 2010 ("second settlement agreement") was entered into, the terms of which included, the following:

(i) Apac Sunrise acknowledged that it is indebted to the appellant and MLP jointly in the amount of RM14,755,854.67, inclusive of the principal loan sum of RM10,000,000 which remained unpaid to the appellant;

(ii) the manner of repayment of Apac Sunrise's debt to both the appellant and MLP had been changed to that of an instalment plan with an extension of 36 months on a fixed schedule of repayment;

(iii) the winding-up petition and both the first suit and the second suit are also to be withdrawn; and

(iv) Apac Sunrise shall cause the appellant to sign a declaration of trust as attached in the second schedule of the second settlement agreement pursuant to cl. 11 to preserve the validity and enforceability of the guarantee.

[10] The winding-up petition and both the first suit and the second suit were then all withdrawn. The respondent had also signed the declaration preserving the validity and the enforceability of the guarantee.

[11] Shortly after, and before the first instalment repayment was even due under the second settlement agreement, the appellant filed a suit against Rossmaizati *vide* Shah Alam High Court Suit No. 22-939-2010 ("Shah Alam suit") on 30 June 2010 and the respondent was added subsequently as a co-defendant on 31 January 2012 to claim back the sum of RM10,000,000 from them as guarantors pursuant to the earlier letter of demand of 12 June 2009.

[12] However, on 21 May 2014, the High Court in the Shah Alam suit held that:

(i) clause 11 of the second settlement agreement does not avoid or nullify the first settlement agreement; and

(ii) the writ was filed prematurely on 30 June 2010 whilst the first instalment under the second settlement agreement was only to commence on 1 August 2010.

[13] Therefore, the Shah Alam suit was dismissed with liberty to file afresh as it was held that at the time of the filing of the suit, the liability to pay under the second settlement agreement had not arisen and thus, the appellant's claim was premature.

[14] The appellant then instructed its current solicitors, Messrs Ringo Low & Associates to issue a fresh letter of demand dated 29 June 2016 to the respondent demanding the sum of RM10,000,000 together with interest thereon at the rate of 14.4% per annum from 9 February 2009. The respondent had confirmed receipt of the said demand.

[15] On 21 July 2016, this suit was filed by the appellant against the respondent seeking for RM10,000,000 with interest at a rate of 14.4% from 9 February 2009 to full settlement.

Finding Of The High Court

[16] The LHCJ dismissed the appellant's claim against the respondent with costs of RM80,000. The LHCJ was of the view that since this action was only filed by the appellant on 21 July 2017, the appellant's claim is time-barred under s. 6 of the Limitation Act 1953, as it was filed outside the six years' limitation period calculated from the date of the appellant's second demand *vide* the second letter of demand dated 12 June 2009.

The Appellant's Submission

[17] Counsel for the appellant submitted that it settled law that the liability of a guarantor arises only on demand made. The service of a notice of demand is a prerequisite for the institution of any proceedings in respect of the claim against a guarantor.

[18] The respondent's liability as a guarantor only arose when the letter of demand supporting the present action was issued to the respondent on 29 June 2016. With this demand, the appellant had until 28 June 2022 to commence any legal action against the respondent.

[19] The second settlement agreement had altered and extended the time and manner for Apac Sunrise to settle the amount owing to the appellant by 36 monthly instalments to commence only on 1 August 2010. This was readily admitted by the respondent during cross-examination.

[20] The letter of demand dated 12 June 2009 was spent and had been rendered nugatory by the second settlement agreement which had extended the timeline of repayment of the RM10,000,000 due and owing by Apac Sunrise and/or the respondent. As such, it was lawful for the appellant to issue the fresh letter of demand dated 29 June 2016 to the respondent after Apac Sunrise and/or the respondent had failed to pay back the sum of RM10,000,000 in accordance with the terms of the second settlement agreement.

[21] The LHCJ in the Shah Alam suit had also expressly held that the second settlement agreement superseded the first settlement agreement only as to the terms of repayment and that the respondent's obligations under the guarantee have to be now construed and ascertained from the four corners of the second settlement agreement. Again, this could only mean that the letter of demand dated 12 June 2009 had become invalid and/or inoperative as the liability of the defendant as a guarantor could not have arisen therefrom.

The Respondents' Submission

[22] Counsel for the respondent submitted that in this case six years had lapsed since the issuance of the appellant's letter of demand dated 12 June 2009. The deadline to refile this suit was on 11 June 2015. Therefore, when the appellant filed the suit on 21 July 2016, their action was time-barred.

[23] The liability under the second demand remained unchanged and the third demand dated 29 June 2016 was an afterthought. Consequently, the suit filed on 21 July 2017 based on the third demand was time-barred and an abuse of process.

[24] The contention that the second settlement agreement had altered and extended the time of repayment of the principal debtor by 30 monthly instalments to commence from 1 August 2010, was not pleaded in the appellant's statement of claim or appellant's reply. In fact, it was considered by the appellant to be irrelevant to the appellant's claim.

[25] The second demand dated 12 June 2009 was valid and operative at the time of entry of the second settlement agreement on 25 June 2010. The entry of the second settlement agreement did not render the second demand dated 12 June 2009 against the respondent inoperative in any way whatsoever.

Our Decision

[26] We have to state at the outset that at the time of hearing this appeal until its conclusion, we did not have the benefit of the grounds of judgment ("GOJ") of the LHCJ who had heard the civil suit that is the subject of this appeal and delivered judgment against the appellant. We would, thus, make no reference to her GOJ in arriving at our decision.

[27] We note that the decision of the LHCJ to dismiss the appellant's claim with costs of RM8,000 was essentially on the basis that based on the facts and circumstances of the present case, the action was time-barred.

[28] In the LHCJ's view, the plaintiff was relying on the first settlement agreement and the letter of guarantee and undertaking ("LGU") executed by the defendant pursuant to that agreement as pleaded in the statement of claim. As the breach of the guarantee occurred on 12 June 2009 the action ought to have been filed on or before 11 June 2015 but was only filed on 21 July 2017 contrary to s. 6 of the Limitation Act 1953 ("LA").

[29] It was common ground that in the determination of this appeal, the one and only central issue to be tried is whether the appellant's action is time-barred pursuant to s. 6 of the LA which provides as follows:

> 6. Limitation of actions of contract and tort and certain other actions
>
> (1) Save as hereinafter provided the following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say:
>
> (a) actions founded on a contract or on tort;

[30] The respondent's contention was primarily that in this case, six years had lapsed since the issuance of the appellant's second demand dated 12 June 2009. The deadline to refile the suit was on 11 June 2016. Therefore, when the appellant filed the suit only on 21 July 2016, their action was time-barred.

[31] Hence, the respondent's position primarily hinges on the said second notice of demand ("second NOD") being the point in time from which time begins to run for purposes of limitation. As for the third NOD dated 29 June 2016, it was contended that it was an afterthought and consequently, the instant suit although premised on the third NOD was time-barred and an abuse of process. Reference was made to the following cases:

(i) *Tetuan Theselim Mohd Sahal & Co & Ors v. Tan Boon Huat & Anor* [2017] 6 CLJ 368;

(ii) *Tan Hood Keng v. ARP Aronasalam Chetty & Anor* [1912] 1 LNS 2; [1934] 1 MLJ 166; and

(iii) *PB Securities Sdn Bhd v. Autoways Holdings Bhd* [2000] 4 CLJ 811; [2000] 4 MLJ 417.

[32] We will now look at the main issues canvassed by the appellant in support of its appeal that the LHCJ had erroneously decided this core issue. As submitted by the respondent, the appellant mounts their appeal on three main issues:

(i) The second settlement agreement had altered and extended the time of repayment of the principal debtor by 30 monthly instalments to commence from 1 August 2010.

(ii) The amount in the letter of demand dated 29 June 2016 and the amount in the letter of demand dated 12 June 2009 are different.

(iii) The present claim is based on letter of demand dated 29 June 2016 and therefore, the appellant's claim is not barred by limitation.

[33] According to the appellant, the following important issues pertinent to the resolution of the core issue of limitation should be answered in the affirmative:

(i) Whether the respondent is liable as a guarantor for the repayment of RM10,000,000 to the appellant pursuant to the letter of guarantee and undertaking dated 20 February 2009?

(ii) Whether the letter of demand dated 29 June 2016 is enforceable?

(iii) Whether the respondent is liable to pay the appellant the amount of RM10,000,000 pursuant to the letter of demand dated 29 June 2019?

[34] Central to the thrust of the appellant's case that its claim was not time-barred was the principle governing the liability of the respondent as a guarantor. On this crucial point, it was submitted as follows:

> It is settled law that the liability of a guarantor arises only on demand made. The service of a notice of demand is a prerequisite for the institution of any proceedings in respect of the claim against a guarantor.
>
> See *Mok Hin Wah & Ors v. United Malayan Banking Corp Bhd* [1987] [1987] 2 CLJ 197; [1987] CLJ (Rep) 219; [1987] 2 MLJ 610 where the Supreme Court held as follows at p. 220 (CLJ); pp. 610H and 611D (MLJ):
>
> > ... In our opinion, the law is very clear on this point. The respondent as creditor must prove a real demand by sending actual notice of demand to the respective guarantors ...
> >
> > ... Since bank guarantees invariably specify that the liability of the guarantor is to pay on demand, the words are not devoid of meaning or effect but make the demand a condition precedent to suing the guarantor.
>
> It is also pertinent to note that the Court of Appeal in *Soon Peng Yam & Anor v. Bank Of Tokyo-Mitsubishi (Malaysia) Bhd* [2004] 1 CLJ 532; [2004] 2 MLJ 31, held at p. 31 that:
>
> > (1) The liability of a guarantor arises only on demand made. The service of a notice of demand is a prerequisite for the institution of any proceedings in respect of the claim.

[35] Consistent with settled law that a guarantor only becomes liable to pay on demand as in this case, the accrual of the cause of action would be calculated from date the letter of demand is issued to the guarantor which would be the event that triggers the cause of action upon non-compliance.

(See *Malayan Banking Bhd v. Boo Hock Soon* [2012] 1 LNS 971; [2013] 2 MLJ 843 (CA)).

[36] In the context of the instant case, it was contended that the respondent's liability as a guarantor only arose when the letter of demand supporting the present action was issued to the respondent on 29 June 2016. Thus, with this demand, the appellant had until 28 June 2022 to commence any legal action against the respondent. Hence, that the LHCJ had erred in principle in holding, on the present facts, that the appellant's claim was time-barred.

[37] It has to be reiterated that, basically, the respondent contended that the appellant's first letter of demand dated 12 June 2009 to the respondent was still valid and thus, the appellant is barred from initiating a suit against him more than six years thereafter, ie, after 11 June 2015. The appellant, on the other hand, contended that this was an erroneous proposition because the second settlement agreement had altered and extended the time and manner for Apac Sunrise (the principal debtor) to settle the amount owing to the appellant by 36 monthly instalments to commence only on 1 August 2010. This was readily admitted by the respondent during cross-examination.

[38] Assuming that the appellant is correct on the new repayment plan of the debt being operative, the 14 days period accorded to the respondent under the first LOD dated 12 June 2009 would no longer be valid and operative as the new repayment period of 36 months began to run only on 1 June 2010.

[39] We concur with the appellant that the conduct of the parties in entering into the second settlement agreement is a relevant factor in determining the date of accrual of the cause of action. It is vital to note that the second settlement agreement had extended the time for Apac Sunrise to settle the debt to the appellant and the respondent had acknowledged that the guarantee remained valid and binding. In view of the parties' conduct, the appellant invoked the doctrine of estoppel in contending that the respondent ought now to be estopped from claiming otherwise, namely, that the letter of demand of 12 June 2009 is still valid and operative. Reliance was placed on the Federal Court case of *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd* [1995] 4 CLJ 283; [1995] 3 MLJ 331, which held at p. 332C-D:

> The doctrine of estoppel is a flexible principle by which justice is done according to the circumstances. It is a doctrine of wide utility and has been resorted to in varying facts patterns to achieve justice. The maxim

> 'estoppel may be used as a shield but not a sword' does not the limit the doctrine of estoppel to the defendants alone. plaintiffs too may have recourse to it. Estoppel may assist a plaintiff in enforcing a cause of action by preventing a defendant from denying the existence of some fact which would destroy the cause of action.

(See also s. 115 of the Evidence Act 1950).

[40] In our view, the intention of the parties in entering into the second SA as reflected by its terms is indisputably to alter the time of repayment to 36 months and not to retain the 14-day period as demanded earlier against the guarantors, the respondent included, pursuant to the LOD dated 12 June 2009 which for all intents and purposes could be regarded as having been rendered nugatory and ineffective.

[41] We must also give due regard to the fact that despite highlighted to us by the respondent that the LOD pursuant to the second settlement agreement was an unpleaded issue in respect of the appellant's cause of action in the second suit, the respondent acknowledged the existence of the second settlement agreement while at the same time maintaining that the first LOD dated 12 June 2009, was still subsisting. We agree with the appellant that this position could be rightly described as "blowing hot and cold" as the second settlement agreement had altered the deadline for repayment by the principal debtor of the debt that had accrued to the appellant. It is a case of adopting two inconsistent and irreconcilable positions that is not acceptable under the principle of approbation and reprobation that would render the respondent's defence against a valid claim for a proven debt untenable. (See *Cheah Theam Kheng v. City Centre Sdn Bhd (In Liquidation) & Other Appeals* [2012] 2 CLJ 16).

[42] We agree with the appellant's proposition that the LOD dated 12 June 2009 had become spent and been rendered nugatory by the second settlement agreement which had extended the timeline for repayment of the debt of RM10 million owed by Apac Sunrise and/or the respondent. When neither repaid the debt, it was lawful for the appellant to issue the fresh letter of demand dated 29 June 2016 to Apac Sunrise and/or the respondent.

[43] We are minded to consider the chronology of events preceding the filing of this suit, in particular the Shah Alam High Court suit ("SA suit") filed by the appellant on 30 June 2010 against one of the guarantors, Rossmaizati, to claim back RM10 million owed by Apac Sunrise. The respondent was added as a co-defendant on 31 January 2012. It is important to have in mind the decision of the High Court in the SA suit which was dismissed with liberty to file afresh because it was held that the appellant's cause of action against the respondent pursuant to the guarantee was premature as at the date of filing of the writ because it was filed on the 30 June 2010 which was before the deadline for the first repayment by Apac Sunrise falling on 1 August 2010 as per the second settlement agreement.

[44] Based on the judgment, the first LOD dated 12 June 2009 had become invalid and/or inoperative and no liability could be attributed to the respondent as a guarantor under the same. Hence, it was crucial under the circumstances and in view of the decision in the SA suit to issue a fresh letter of demand as a basis to commence a fresh suit which the appellant did *via* the present suit to recover the substantial debt owed to them.

[45] We have noted that the decision of the High Court in the SA suit which remains in force is squarely in accord with the judgment in *The Pacific Bank Bhd v. Chan Peng Leong* [1998] 2 CLJ 440; [1998] 2 MLJ 613 where the Court of Appeal held as follows at p. 448 (CLJ); p. 620A-B (MLJ):

> In the present instance, the point in issue in the first action that was determined necessary and with precision was that the demand upon which the action was based was invalid. There was, in other words, no demand. The first action had therefore been commenced prematurely. The bank was accordingly at liberty to issue a proper demand and to institute proceedings to enforce the guarantee based upon that demand. Per Gopal Sri Ram JCA.

[46] Importantly too, the second settlement agreement and the LOD dated 29 June 2016 were recognised by the LHCJ in the SA suit and the decision therein necessitated the filing of the present suit to recover from the respondent as a guarantor the RM10 million debt as the second LOD was held to be premature. As the instant claim is pursuant to the 29 June 2016 LOD there was no question of 12 June 2009 LOD being relevant to the time of accrual of the cause of action as contended by the respondent. Likewise, in view of this vital fact which the LHCJ in our view had failed to address the question of the second settlement agreement not having been pleaded by the appellant also did not arise.

[47] As to the various leading authorities cited by the respondent on the principles governing the defence of limitation in relation to the time of accrual of the cause of action for the purposes of limitation, we have no issue with the principles enunciated therein. In particular, as to the settled principle that time begins to run from the first notice of demand ("NOD") issued by the creditor instead of the subsequent NODs. We, however, are of the view that the factual premise of each case is vital in determining when time ought to run. (See *Nik Che Kok v. Public Bank Bhd* [2001] 2 CLJ 157).

[48] The decision of the Court of Appeal in *Nik Che Kok* (*supra*) clearly turns on its own facts that the first NOD formed the basis of suit against the principal debtor and the guarantors instead of the subsequent NODs.

[49] It is significant that the factual premise of the case at hand is peculiar, particularly in regard to the suit based on the NOD dated 12 June 2009 made against the respondent which was dismissed by the High Court in the SA suit with liberty granted to the appellant to file an action afresh. It effectively rendered the said NOD ineffective and irrelevant. This is also not a case

where the earlier suit based on a previous NOD was discontinued or withdrawn but a suit necessitated by a decision of the court on the said NOD and altered terms of repayment as agreed upon by the parties themselves. (See *Affin Bank Bhd v. Goh Hock Hai* [2013] 1 LNS 307; Civil Appeal No. P-02(IM)(NCVC)-1211-05-2012).

[50] Similarly, the facts in the case of *Joseph Thambirajah v. Bank Buruh (M) Bhd (Now Known As BSN Commercial Bank (M) Bhd)* [2007] 1 LNS 715; [2008] 2 MLJ 773 are patently distinguishable from those in our case. In that case, the first suit based on the first NOD was allowed to lapse for about ten years by the bank and was struck out on the application of the defendant. The bank then issued a fresh NOD following which a second suit was filed against the same. It was correctly held by the Court of Appeal that limitation had set in and the doctrine of estoppel prevented the bank from filing a subsequent suit against the borrower/debtor.

[51] Reverting to the respondent's contention on the pivotal issue of limitation, the crux of it is that the appellant's primary assertion that the SA2 had extended the prescribed time of repayment by the principal debtor to 30 monthly instalments was not a pleaded issue and should not be considered by the court. It was highlighted that in its reply to defence, the appellant's claim was wholly-based on the guarantee and not on any settlement agreement. The LHCJ in arriving at her decision agreed with the respondent that the issue at hand was an unpleaded issue as reflected in the appellant's reply.

[52] According to the respondent in his submission, the LHCJ had considered that the following three issues raised by the appellant were new issues which were not pleaded in the appellant's statement of claim or reply:

(i) That the conduct of Apac Sunrise and the appellant in entering into SA2 rendered the second demand dated 12 June 2019 nugatory based on estoppel by conduct as the time of repayment had been extended.

(ii) That the second demand was superseded by the SA2 pursuant to the decision of the Shah Alam suit as the appellant's position was that the second demand had been rendered invalid and inoperative by entry of SA2.

(iii) That the amount claimed in the second demand is different from the amount claimed in the third demand dated 29 June 2016.

[53] It was, therefore, submitted that the appellant should not be permitted to pursue its claim based on new and unpleaded issues by reliance on the well-settled principle of law that no party should be allowed to adduce evidence unpleaded on facts and issue. (See *Samuel Naik Siang Ting v. Public Bank Bhd* [2015] 8 CLJ 944; [2015] 6 MLJ 1).

[54] Additionally, the respondent further submitted that the entry of SA2 (which was signed five days prior to the Shah Alam suit) had nothing to do with the liability of the guarantors under the terms of the guarantee. It was pointed out that the appellant did not obtain a fresh guarantee from the guarantors and neither was there provision for a new guarantee from the guarantors when the SA2 was entered into as admitted in cross-examination by the appellant's director himself (PW1).

[55] Now, Second Schedule of SA2 provides that the validity and enforceability of the guarantee would not be affected by the entry of the SA2. By filing the SA suit barely five days following the entry of the SA2, the appellant, as admitted by PW2, had taken the position that the guarantee was not affected by the entry of SA2 which had no provision for a fresh guarantee to be furnished.

[56] In the circumstances, in support of the LHCJ's finding on the issue of the continuing validity of the second demand, the respondent contended that it was valid and operative at the time of entry of SA2 on 25 June 2010 and was not rendered inoperative against the defendant in any way whatsoever.

[57] With respect, the respondent's contention as above which the LHCJ had upheld, is, in our judgment, misconceived and erroneous. On this point, it is crucial to note that the guarantee is a continuing guarantee that would subsist based on the principal debtor's indebtedness to the appellant which would entitle the latter to issue a fresh demand to the guarantor should the terms and deadline for repayment be altered by agreement which is precisely what occurred in the present case. It would be illogical if it were not so as subsequent to the second demand the parties had mutually agreed to be bound by new terms of settlement of the debt.

[58] Notwithstanding that the second settlement agreement was not pleaded in the SOC, a crucial fact is that the cause of action against the respondent as the guarantor for Apac Sunrise is founded on the third NOD and the amount claimed is as per this notice. Contrary to what was held by the LHCJ that no differences could be drawn between the second and third LODs dated 12 June 2009 and 29 June 2016 respectively as the principal sum claimed remained the same and unchanged, we observe that the terms of the two LODs are conspicuously different as highlighted by the appellant and adverted to by us earlier. Amongst others, the term as to interest payment differs and so does the deadline imposed for settlement of the debt. In any event, of paramount importance is that the appellant's current suit against the respondent is based on the amount claimed as per the letter of demand of 29 June 2016 pursuant to the second settlement agreement and clearly not based on the letter of demand of 12 June 2009 as contended by the respondent.

Conclusion

[59] In light of the aforesaid, in our judgment, the LHCJ had plainly erred in principle and fact in concluding that limitation had set in based on the misconceived view that appellant's claim was pursuant to the LOD dated 12 June 2019 which had lapsed whereas the LOD dated 12 September 2016 is lawful, valid and enforceable. As such, for purposes of limitation, time should begin to run from 12 September 2016 which would render the current suit to be within the statutory limitation period. This LOD was duly served on the principal debtor and the respondent but the debt claimed remained unsettled.

[60] We would, in the circumstances, conclude that the LHCJ had come to a plainly wrong finding that on the evidence adduced the appellant had failed to successfully prove its claim on a balance of probabilities by reason of the defence of limitation which had not been established. To reiterate, our considered view is that the LHCJ had erred when she found that the second letter of demand dated 12 June 2009 was valid and subsisting despite the second settlement agreement that varied the terms of the repayment. Consequently, we are of the considered view that the finding that limitation had set in is wrong in fact and law.

[61] We, therefore, allow this appeal and set aside the decision of the High Court. Accordingly, the appellant's claim as prayed for in paras. (a), (b) and (c) of the statement of claim is allowed. By consent, costs of RM100,000 here and below to the appellant subject to the payment of allocator's fee.